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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

HIPOLITO RIVERA-RAMIREZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

Whether the Fifth and Sixth Amendments to the United States Constitution and Rule 11 of the Federal Rules of Criminal Procedure permit a guilty plea to stand (and the defendant, a first-time offender, to be incarcerated essentially for the rest of his life for crimes he insists he did not commit) on the pretext that there were only "technical" errors in the plea-taking process, where:

1. The District Court failed to ascertain from the defendant that there was a factual basis for the plea;

2. The District Court failed to explain to the defendant, who spoke no English and did not understand the American legal system, the meaning of the charges of "conspiracy" and "possession

with intent to distribute," and affirmatively misled him by describing the charges as "distribution";

3. The District Court erroneously believed the defendant had been implicated as a drug ringleader, when in fact he had not been and was not, and imposed an incredibly harsh sentence based on that false belief;

4. The defendant's own attorney misled him as to his rights and the evidence against him and made no effort to challenge the erroneous allegation that defendant was a ringleader;

5. The defendant was misinformed that he had to plead guilty or his young pregnant wife would be charged too, and their child placed in a foster home;

6. The defendant moved promptly to set aside his plea and sentence after obtaining new counsel with whom he could

effectively communicate and from who he learned his actual rights; and

7. The defendant's plea was part of a bargain that was no bargain at all and resulted in the very sort of sentence he plead guilty to avoid?

Defendant-Appellant, HIPOLITO RIVERA-RAMIREZ, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

PARTIES TO THE PROCEEDING IN LOWER COURT

Plaintiff: UNITED STATES OF AMERICA

Defendant: HIPOLITO RIVERA-RAMIREZ

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i.
PARTIES TO THE PROCEEDING IN LOWER COURT	iv.
TABLE OF AUTHORITIES	viii.
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	6
A. The Indictment.	6
B. The Coerced Decision to Plead Guilty.	7
C. The Plea-Taking Ritual.	8
D. The Sentencing of the Wrong Man.	13
E. The Summary Denial of Petitioner's Motion to Withdraw his Guilty Plea.	16

Table of Contents - Continued

		Page
REASONS FOR GRANTING THE PETITION		20
I	THE DISTRICT COURT'S FAILURE TO ASSURE THAT PETITIONER UNDERSTOOD THE NATURE OF THE CHARGES AGAINST HIM, THAT THERE WAS A FACTUAL BASIS FOR A GUILTY PLEA, AND THAT DEFENDANT UNDERSTOOD THE CONSEQUENCES OF HIS PLEA, CONSTITUTED A DENIAL OF PETITIONER'S CONSTITUTIONAL RIGHTS, NOT A MERE "TECHNICAL" VIOLATION OF PLEA-TAKING RULES.	20
II	IT IS A MANIFEST INJUSTICE TO ALLOW PETITIONER'S GUILTY PLEA AND DRACONIAN SENTENCE TO STAND.	28
CONCLUSION		35

Table of Contents - Continued

Page

APPENDIX A

OPINION, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT affirming order denying leave to withdraw the guilty plea. A-1

APPENDIX B

ORDER, UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA, minutes of defendant's hearing re motion to withdraw guilty plea, motion denied. B-1

APPENDIX C

ORDER, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, petition for rehearing denied. C-1

TABLE OF AUTHORITIES

Cases	Page
Alessi v. United States, 593 F.2d 476, 479 (2nd Cir. 1979)	23, A-9
Blackledge v. Allison, 431 U.S. 63, 74 (1977)	A-19
Henderson v. Morgan, 426 U.S. 637, 644-645, 96 S.Ct. 2253 (1966)	22
Hill v. United States, 368 U.S. 424, 428 (1962)	A-9
Irizarry v. United States, 508 F.2d 960, 965-966 (2nd Cir. 1974)	24
Kadwell v. United States, 315 F.2d 667, 670, (9th Cir. 1963)	A-11
Mack v. United States, 635 F.2d 20, 24, 25 (1st Cir. 1980)	22, 23, A-12
McCarthy v. United States, 394 U.S. 459, 466 89 S.Ct. 1166 (1969)	20, 21, 22, 23, A-6, A-8, A-10, A-12
Nash v. Isreal, 533 F.Supp. 1378, 1383-1384 (E.D. Wis. 1982)	23
Santobello v. New York, 404 U.S. 257, 261 (1971)	A-15

Table of Authorities - Continued

Cases	Page
Sierra v. Government of Canal Zone, 546 F.2d 77, 80 (5th Cir. 1977)	24
Smith v. O'Grady, 312 U.S. 329, 334 61 S.Ct. 572 (1941)	22
Townsend v. Burke, 334 U.S. 736, 740, 68 S.Ct. 1252, 1255 (1948)	31
United States v. Aguerro-Segovia, 622 F.2d 131, 132 (5th Cir. 1980)	30
United States v. Barker, 681 F.2d 589, 592 (9th Cir. 1982)	A-14
United States v. Baylin, 696 F.2d 1030, 1037 fn. 17 (3rd Cir. 1982)	23
United States v. Becklean, 598 F.2d 1122, 1125-26 (8th Cir.) cert. denied, 444 U.S. 864 (1979)	25
United States v. Cantor, 469 F.2d 435, 437 (3rd. Cir. 1972)	A-11

Table of Authorities - Continued

Cases	Page
United States v. Coure, 632 F.2d 665, 666 (6th Cir. 1980)	34
United States v. Crook, 607 F.2d 670, 672 (5th Cir. 1979)	A-9
United States v. Degand, 614 F.2d 176, 178 (8th Cir. 1980)	A-19
United States v. Del Prete, 567 F.2d 928, 929 (9th Cir. 1978)	24
United States v. Fatico, 579 F.2d 707, 712 (2nd Cir. 1978) cert. den. 444 U.S. 1073 (1980)	30
United States v. Harris, 534 F.2d 141 n.1 (9th Cir. 1976)	A-21
United States v. Landry, 463 F.2d 253 (9th Cir. 1972)	25
United States v. Laura, 500 F.Supp. 1347, 1355, (E.D. Pa. 1980)	A-8
United States v. Lopez-Beltran, 619 F.2d 19, 20 (9th Cir. 1979)	A-7

Table of Authorities - Continued

Cases	Page
United States v. Mercer, 691 F.2d 343, 347-348 (7th Cir. 1982)	23
United States v. Moore, 599 F.2d 310, 314 (9th Cir. 1979) cert. denied, 444 U.S. 1024 (1980)	A-19
United States v. Neel, 547 F.2d 95, 96 (9th Cir. 1976)	A-15
United States v. Ordonez, (C.A. No. 82-1506, Dec. 23, 1983)	29
United States v. Pinkney, 551 F.2d 1241 (D.C. Cir. 1976)	32
United States v. Rivera-Ramirez, 715 F.2d 453 (1983)	1
United States v. Timmreck, 441 U.S. 780, 784-85 99 S.Ct. 2085 (1979)	21, 22, 23, A-7, A-9, A-10, A-21
United States v. Watson, 548 F.2d 1058, 1063 (D.C. Cir. 1977)	A-8, A-10, A-11
United States v. Weston, 448 F.2d 626, 634 (9th Cir. 1971)	30

Table of Authorities - Continued

Cases	Page
Washington v. Strickland, 673 F.2d 879, 892 (5th Cir. 1982)	32
Constitution of the United States of America	
Fifth Amendment	i, 2
Sixth Amendment	i, 2
Fourteenth Amendment	19
Statutes	
Title 8, United States Code, Section 1325	A-21
Title 21, United States Code, Section 841(a)(1)	7, A-2
Section 846	6, A-2
Title 28, United States Code, Section 1254(1)	2
Section 2255	A-7, A-8, A-10, A-21

Table of Authorities - Continued

Rules	Page
Federal Rules of Appellate Procedure,	
Rule 4(b)	A-7
Rule 35(b)	C-2
Federal Rules of Criminal Procedure,	i, 3, 16, 23, A-5, A-6,
Rule 11, 11(c)(1)	A-12, A-14, A-18, A-21
Rule 32(c)(3)(A)	2a, 19
Rule 32(d)	3, 18, A-2, A-4, A-6, A-7, A-8, A-9, A-10, A-11, A-21, A-22
Practices	
Federal Practice and Procedure, Section 539 at 211 & n. 11 (2d ed. 1982)	A-10
Moore's Federal Practice, J. Moore, ¶ 32.07(4) (2d. ed. 1978)	A-21
Law Review Articles	
Borman, The Hidden Right to Direct Appeal from a Federal Plea Conviction, 64 Cornell L. Rev. 319, 327, 333 & n. 81 (1979)	A-8

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit is reported at 715 F.2d 453 and reprinted as Appendix A to this Petition. The unreported Order of the United States District Court for the Central District of California denying Petitioner's motion to withdraw his guilty plea is reprinted as Appendix B to this Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on September 6, 1983. A petition for rehearing was denied on January 4, 1984, and is reprinted as Appendix C to this Petition. The jurisdiction of this Court is invoked under Title 28, United States Code, Section

1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ."

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> ". . . nor deny to any person within its jurisdiction the equal protection of the laws."

Rule 32(c)(3)(A) of the Federal Rules of Criminal Procedure provides as follows:

> "Before imposing sentence the court shall upon request permit the defendant, . . . to read the report of the presentence investigation . . . and the court shall afford the defendant . . . an opportunity . . . to introduce testimony or other information relating to any alleged factual inaccuracy contained in the presentence report."

Rule 32(d) of the Federal Rules of Criminal Procedure provides as follows:

> "A motion to withdraw a plea of guilty or nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw this plea."

Rule 11 of the Federal Rules of Criminal Procedure provides in pertinent part as follows:

> ". . .(c) Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:
>
> (1) the nature of the charge to which the plea is offered, the mandatory minimum penalty by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole term; and
>
> (2) if the defendant is not represented by an attorney,

that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and

(3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and that he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and

(4) that if the plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and

(5) if the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which he has pleaded, that his answers may later be used against him in a prosecution for perjury or false statement.

(d) The court shall not accept a plea of guilty or nolo contendere without first,

by addressing the defendant personally in open court, determine that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or his attorney.

. . .

(f) Notwithstanding the plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea."

STATEMENT OF THE CASE

A. The Indictment.

Petitioner, a 48 year old auto mechanic with no criminal record either in America or in his native country of Colombia, and his 17 year old common-law wife who was pregnant with his child, were arrested in September, 1981, during a police raid on the apartment building in which he lived. Petitioner was separated from his young wife and jailed, and subsequently, his bail was increased to five million dollars. Thereafter, however, he was denied bail at all.

In October, 1981, Petitioner was indicted along with six other persons on one count of conspiracy to possess and distribute cocaine (Title 21, United States Code, Section 846) and one count of know-

ingly and intentionally possessing cocaine with intent to distribute (Title 21, United States Code, Section 841(a)(1)). The indictment alleged that in furtherance of the conspiracy, Petitioner rented an apartment, purchased a car, transported money, drove one co-conspirator to the airport and met another co-conspirator in an apartment. (C.T. 2.)

B. The Coerced Decision to Plead Guilty.

In November, 1981, Petitioner's then attorney showed him a letter from the prosecutor threatening to file an additional charge of operating a continuing criminal enterprise which would result in a life sentence without possibility of parole unless Petitioner pleaded guilty to the two pending charges. The attorney said that the evidence against Petitioner was strong, that the prosecutor could add

charges at will, that he could not find out who the prosecution's witnesses were until it was too late, and that fighting the charges would only anger the trial judge and ensure a life sentence. The attorney also said that if Petitioner pleaded guilty, the prosecutor would not file criminal charges against Petitioner's 17 year old pregnant wife nor would he place their child, after birth, in a foster home. Having no understanding of the American criminal system and unaware of his actual rights to contest the prosecutor's charges and to be adequately represented by competent counsel, Petitioner agreed to plead guilty. (C.R. 86.)

C. The Plea-Taking Ritual.

On November 16, 1981, Petitioner appeared in Court and portions

of the indictment, couched all in technical legal jargon, were read to him. The District Judge rattled off a series of Constitutional rights which, through an interpreter and in one-word answers, Petitioner acknowledged he understood and was willing to waive. Petitioner said his guilty plea was free and voluntary, that he had not been threatened, and that he had not been promised what his sentence would be (Nov. R.T. 5-19.). Petitioner later explained that his then attorney had instructed and guided him how to answer the questions and told him the questions were mere formalities. (C.R. 86.) In fact, if Petitioner had understood his rights and known he faced the real possibility of receiving a 30-year sentence, he never would have pleaded guilty. (C.R. 86.)

The District Court failed to explain to Petitioner any of the legal elements of the charges against him. The Court did not define "conspiracy" nor "possession with intent to distribute." The Court simply asked what he did with regard to the "conspiracy" and "distribution" [sic]. Petitioner admitted only the following (Nov. R.T. 25):

> "I am guilty, because knowing that a man had cocaine and money as a result of these illegal transactions, I worked for him . . . I worked as a mechanic in maintaining some of the vehicles that were used to transport the drugs and the money from one place to another, and worked for a salary. They paid me monthly, knowing, as I have said, that this man and some others were in this drug transactions."

When the Court asked Petitioner what he had to do with the "cocaine that was allegedly distributed [sic] within Los Angeles County at that time" (the real charge was possession with intent

to distribute), Petitioner conferred with his attorney and then demurred as follows (Nov. R.T. 26):

> "I was arrested in an apartment very different when they could have found the drugs. I have no knowledge of the amount that they had or existed.
>
> What I did know is that they had some quantity, some place in that area, in that complex, but I did not know exactly what quantity it was."

The prosecutor then admitted this was no basis for accepting a plea to such serious crimes charged, but he asserted that Defendant was "certainly a very knowledgeable member" of the "organization," that he rented apartments, purchased a car and was arrested in an apartment where a money counting machine and ledgers were found. The prosecutor claimed that the ledgers, which contained some cryptic Spanish abbreviations, somehow

showed that Defendant transported money to Florida on September 4, 1981. (Nov. R.T. 27-28.)

The Court asked Petitioner, "Do you agree with any of the statements that he [the prosecutor] has just made?" Petitioner again gave no response. (Nov. R.T. 28.)

At this point, Petitioner's then attorney interrupted to say that it was Petitioner's intent to admit whatever facts which "would give the Court a sufficient factual basis to accept his plea of guilty." (Nov. R.T. 29.)

Finally, under further questioning by the Court, Petitioner would admit only that he had transported cocaine and that when he was arrested he knew there was cocaine in the apartment building, even if he did not know the amount of it. (Nov. R.T. 29-31.)

D. The Sentencing of the Wrong Man.

The sentencing reports presented to the District Court were solely scandalous collections of innuendo and speculation. Based on his own highly exaggerated interpretation of some cryptic Spanish symbols in a ledger, the prosecutor claimed this was "the largest narcotics case with which I am familiar." In gross hyperbole, with no foundation in fact, he alleged that Petitioner was involved in "death dealing in a major scale." The prosecutor then resurrected the very allegations that he had agreed to drop if Petitioner would plead guilty: he proposed to draw "another indictment to appropriately charge this case as a continuing criminal enterprise." (Jan. R.T. 14-21.)

Incredibly, the District Court bought the prosecutor's tale. The

Court recalled (incorrectly, as the prosecution now concedes) "that during . . . the proceeding of a plea of guilty by at least one of the co-defendants, the co-defendant, under oath, indicated that [defendant] is indeed HTO," the alleged ringleader of a cocaine organization.

In fact, Petitioner was not "HTO" and none of the co-defendants had implicated Petitioner as HTO. (Respondent now concedes the latter point [Appellee's Brief, p. 10, fn. 6.].) Unfortunately, Petitioner's then attorney failed to challenge the erroneous statements by the prosecutor and the Court. In desperation, Petitioner made a personal statement to the Court, insisting "that I am not the man that the U.S. Attorney says I am." Petitioner asked for mercy for himself and his family and insisted that he was "the victim of an error through

ignorance and social injustice. I have spent all my living years serving my family and society, and am before you, your honor, as a matter of destiny and not as a criminal." (Jan. R.T. 29-30.)

Ignoring the fact that Petitioner had no prior criminal record, that Petitioner was about to become a father, that there was absolutely no evidence that he was anything other than a mere courier, the District Court imposed the maximum consective sentence of 30 years (effectively, a life term for a 48 year old man) and the maximum fine of $50,000 plus a special parole term of life.

Operating on the false assumption that he was sentencing a notorious drug ringleader, the District Judge chose to single out Petitioner. Various co-defendants, on the identical charges, were given prison terms

ranging from only 5 to 20 years. The Court stated: "The message must go back further than Miami. It must go back to Colombia that when people come here and attempt to destroy our society with the mere aggrandizement of themselves they will be expected to receive the severest penalties possible and they will be meted out." (Jan. R.T. 32.)

E. The Summary Denial of Petitioner's Motion to Withdraw his Guilty Plea.

After consulting with a new attorney only a few months later, Petitioner filed a motion to withdraw his guilty plea or, at least, to reduce his Draconian sentence. (C.R. 86.) In his motion, Petitioner stated he was not in fact guilty of the crimes charged, that his plea had been taken in violation of Rule 11 of the Federal Rules of Criminal

Procedure, that his rights had not been adequately explained to him, that he had been denied effective assistance of counsel, that his plea had been involuntary and uninformed, and that his sentence constituted cruel and unusual punishment and a denial of equal protection. (C.R. 86.)

In an extraordinary document, Petitioner's previous trial attorney filed a declaration opposing Petitioner's motion. Although he claimed he had explained the possible consequences of pleading guilty to Petitioner, the attorney never denied that he told Petitioner the prosecutor would file charges against Petitioner's pregnant wife if Petitioner did not plead guilty and that Petitioner's unborn child, after birth, would be taken away from them. (C.R. 91.)

Without an evidentiary hearing and without comment or explanation, the District Court denied Petitioner's motion to withdraw his guilty plea. (C.R. 92.)

At oral argument before the Ninth Circuit Court of Appeals, the prosecutor conceded, in response to questions from the Court, that based on the record and the responses made (or not made) by Petitioner, that the record did not substantiate a conviction for conspiracy.

Nevertheless, the Court of Appeals concluded in its published Opinion that the errors asserted by Petitioner in the taking of his guilty plea were merely "technical" and did not constitute "manifest injustice" within the meaning of Rule 32(d) of the Federal Rules of Criminal Procedure, and therefore the

denial by the District Court of Defendant's motion to withdraw his guilty plea was not an abuse of discretion. Inexplicably, the Court of Appeals refused even to consider Petitioner's challenge to the harsh and unjustified sentence. (Appendix A.)

Without justification, the District Court denied Petitioner access to his Presentence Report even though he had never seen it. (C.R. 93.) Petitioner's former counsel never denied this fact. Consequently, Petitioner was denied both due process and equal protection of the laws as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution because Petitioner was denied the opportunity to request to read said report to rebut any inaccuracies as guaranteed by Rule 32(c)(3)(A) of the Federal Rules of Criminal Procedure.

REASONS FOR GRANTING THE PETITION

I

THE DISTRICT COURT'S FAILURE TO ASSURE THAT PETITIONER UNDERSTOOD THE NATURE OF THE CHARGES AGAINST HIM, THAT THERE WAS A FACTUAL BASIS FOR A GUILTY PLEA, AND THAT DEFENDANT UNDERSTOOD THE CONSEQUENCES OF HIS PLEA, CONSTITUTED A DENIAL OF PETITIONER'S CONSTITUTIONAL RIGHTS, NOT A MERE "TECHNICAL" VIOLATION OF PLEA-TAKING RULES.

In McCarthy v. United States, 394 U.S. 459, 89 S.Ct. 1166 (1969), this Court outlined the minimum standards set by the Constitution for the taking of a guilty plea (394 U.S. at 466):

> "A defendant who enters such a plea [of guilty] simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusors. For this

> waiver to be valid under the Due Process Clause, it must be 'an intentional relinquishment or abandonment of a known right or privilege.' [Citation.] Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." (Fns. omitted.)

The Court of Appeals in this case, however, in a published Opinion has effectively interpreted United States v. Timmreck, 441 U.S. 780, 99 S.Ct. 2085 (1979) to overrule McCarthy and to mean that even such substantial violations of Constitutional rights in the plea-taking process as occurred in this case can be deemed mere "technical" violations of procedural rules and the guilty plea made to stand despite those Constitutional violations. Petitioner

submits this is not and cannot be the law. Whether or not the formal rules for plea-taking are complied with, an involuntary and uninformed plea is invalid. (Henderson v. Morgan, 426 U.S. 637, 644-645, 96 S.Ct. 2253 (1966); Smith v. O'Grady, 312 U.S. 329, 334, 61 S.Ct. 572 (1941).)

Timmreck, of course, was never intended to overrule McCarthy. Timmreck held only that, in the absence of other aggravating circumstances, a mere technical violation of the plea-taking procedure under Rule 11 of the Federal Rules of Criminal Procedure, did not justify setting aside the plea in a collateral attack. Where, as here, there are aggravating circumstances, however, the plea must be set aside however and whenever it is attacked. Mack v. United States, 635 F.2d 20 (1st Cir. 1980) makes

this clear (at page 24, fn. omitted):

> "Since the requirements allegedly unsatisfied in the instant case are so obviously central to the policy consideration underlying Rule 11, Timmreck does not apply. Here, we follow the holding of McCarthy that 'prejudice inheres in a failure to comply with Rule 11.'"

Other cases finding inherent prejudice in Constitutionally-defective pleas, despite Timmreck, include United States v. Baylin, 696 F.2d 1030, 1037, fn. 17 (3rd Cir. 1982); United States v. Mercer, 691 F.2d 343, 347-348 (7th Cir. 1982); Alessi v. United States, 593 F.2d 476, 479 (2nd Cir. 1979); and Nash v. Isreal, 533 F.Supp. 1378, 1383-1384 (E.D. Wis. 1982).

The defects in the taking of Petitioner's plea go to the very validity of the plea itself: Whether the Petitioner acted knowingly and voluntarily; whether he understood the nature of the charges

against him; and whether there was any evidence to support the charges against him.

The failure to explain to Petitioner the nature of the charges and the law was especially important since he did not speak English and was unfamiliar with the American criminal justice system. In such circumstances, simply reading the indictment to the Petitioner cannot suffice to define the meaning of "conspiracy" (Irizarry v. United States, 508 F.2d 960, 965-966 (2nd Cir. 1974) nor can it suffice to explain the necessary mental element of the charged crimes. (Sierra v. Government of Canal Zone, 546 F.2d 77, 80 (5th Cir. 1977).) Absent an affirmative showing of the Petitioner's understanding of the charges against him, his guilty plea cannot stand. (United States v. Del Prete, 567 F.2d 928, 929 (9th Cir. 1978); United

States v. Landry, 463 F.2d 253 (9th Cir. 1972).)

Moreover, the District Court affirmatively misled Petitioner by asking him to tell the Court what he did with regard to "the distribution of cocaine alleged in Count Two of this indictment" and to explain about the "cocaine that was allegedly distributed." (Nov. R.T. 25-26.) In fact, Petitioner was not charged with actual distribution, and his conviction for one crime certainly cannot be upheld on the grounds that he may have admitted committing some other crime.

The District Court also failed to assure there was a factual basis for Petitioner's plea. Petitioner volunteered only that he worked for a man whom he knew was involved in drug transactions. He adamantly denied he knew the amount of drugs involved and never admitted any

facts amounting to a conspiracy. The prosecutor made grandiose claims that there was a conspiracy, but Petitioner never agreed with the prosecutor's version of the facts. In fact, he insisted that he was not the man the U.S. Attorney said he was. It was Petitioner's counsel, not the Petitioner, who asked the Court to accept the plea as an admission of the facts sufficient to establish quilt on the charged crimes. While the Court of Appeals attempts to attribute the lack of sufficient factual basis in the record to the Petitioner's "tactical decision," this puts the cart before the horse. Petitioner could make a "tactical decision" only if he in fact understood the charges against him and in fact committed the charged crimes. The Court erroneously assumes these facts are true, while the whole point of Petitioner's motion and appeal

is that they are not true, and that it is a manifest injustice to permit the plea to stand because they are not true.

Petitioner filed a ten-page declaration in which he detailed why he would not have pleaded guilty if he had been properly advised. His claim of innocence and his motion to set aside his guilty plea necessarily include the contention that if properly advised he would not have pleaded guilty in the first place. (C.R. 86.)

Petitioner's guilty plea either met Constitutional standards or it did not, it was either voluntary or involuntary, good or bad. Petitioner submits it was unconstitutional, involuntary, and bad. To construe the invalid plea as a mere "technical" violation of fundamental rights is a contradiction in terms. A petition for certiorari should issue to

correct this unconscionable ruling, to resolve the conflict in the published cases it creates, and to set straight the law and procedure for the waiver of Constitutional rights and the taking of guilty pleas.

II

IT IS A MANIFEST INJUSTICE TO ALLOW PETITIONER'S GUILTY PLEA AND DRACONIAN SENTENCE TO STAND.

The District Court sentenced the wrong man in this case. It followed erroneous information that Petitioner was "HTO", the alleged leader of a cocaine ring. The Court was misinformed that a co-defendant in another proceeding had implicated Petitioner as "HTO". (Respondent concedes this point [Appellee's Brief, p. 10, fn. 6.].) The only real

evidence the prosecutor claimed to have showing that Petitioner was the mythical "HTO" was a ledger found in the apartment complex in which Petitioner was arrested. The prosecutor, in a leap of faith rather than logic, erroneously concluded that because "HTO" allegedly went to Miami on September 4, 1981, and that a "H. Rivera" purchased an airline ticket for Miami on that same day, that therefore Petitioner must be "HTO". The Ninth Circuit Court of Appeals has recently held in United States of America v. Ordonez, (C.A. No. 82-1506, Dec. 23, 1983) that such an unauthenticated ledger was inadmissible and insufficient to support convictions for possession of cocaine for distribution. Petitioner has consistently denied he was "HTO", both at the time he plead guilty, at the time of sentencing, and now.

Petitioner had the right not to be convicted and sentenced on the basis of materially false information. (United States v. Aguerro-Segovia, 622 F.2d 131, 132 (5th Cir. 1980); United States v. Fatico, 579 F.2d 707, 712 (2nd Cir. 1978) cert. den. 444 U.S. 1073 (1980).) His sentence could not be based on mere prosecutorial accusations and speculations; it had to be based on real evidence which is persuasive of the validity of the charges made. (United States v. Weston, 448 F.2d 626, 634 (9th Cir. 1971).) For the manifest injustice of sentencing him on false information and wild speculation, the order denying Petitioner's motion to set aside the plea and his sentence should have been reversed.

Furthermore, Petitioner was deprived of effective assistance of counsel at both the plea-taking proceedings and

at his sentencing. His then attorney was unable to clearly communicate with Petitioner and when he did communicate, he gave Petitioner all the wrong advice and none of the right advice. He encouraged Petitioner to enter a plea bargain that was no bargain at all. He made no attempts to disprove the demonstrably false allegations that Petitioner was a ringleader and that a co-defendant had implicated him. Thereafter, incredibly, he filed an affidavit in opposition to his former client's motion to withdraw the guilty plea.

Defense counsel has the duty, among others, to prevent the sentencing court from proceeding on false assumptions in deciding the defendant's punishment. (See Townsend v. Burke, 334 U.S. 736, 740, 68 S.Ct. 1252, 1255 (1948).) Counsel must make an independent search

for evidence and circumstances to mitigate punishment and must be prepared to challenge false or speculative grounds for enhancing punishment. (Washington v. Strickland, 673 F.2d 879, 892 (5th Cir. 1982); United States v. Pinkney, 551 F.2d 1241 (D.C. Cir. 1976).) Here, when the District Court incorrectly stated that Petitioner had been identified in another proceeding as a drug ringleader, Petitioner's then attorney stated only, "Well, that may be." (Jan. R.T. 12.) The direct result of this lack of effective assistance of counsel was indeed a manifest injustice, a sentence of incredible severity, virtually life imprisonment for a first-time offender. For this additional cogent reason, the denial of Petitioner's motion to set aside his guilty plea and sentence must be reversed.

Finally, Petitioner entered a

plea bargain that was no bargain at all. With the unknowing complicity of Petitioner's own attorney, the prosecutor was able to obtain the same net result, effectively, a life sentence, of convicting Petitioner of a more serious, uncharged crime, without having to prove that crime or any crime at all. The prosecutor simply agreed to accept the plea to the so-called lesser charges of conspiracy and possession, and then argued, at the time of sentencing, that Petitioner was in fact guilty of the more serious uncharged crime of operating a criminal conspiracy. The trial court sentenced Petitioner as if he was in fact a cocaine ringleader, indeed, as if he was personally responsible for the wrongdoings of every criminal in Florida and Colombia.

This plea-bargaining trap cannot be countenanced. Where the spirit of a

plea bargain is breached by the prosecution or the court, resulting, as in this case, in a bargain which is no bargain at all for the defendant, the plea must be and should be set aside. (United States v. Coure, 632 F.2d 665, 666 (6th Cir. 1980).)

In short, Petitioner was the victim of a manifest injustice compounded by manifest injustice again. He did not understand his rights. He was sold a bill of goods by the prosecution and his own ineffective attorney. He got nothing in return for his guilty plea except the very sentence he pleaded guilty in order to avoid.

CONCLUSION

For each of the reasons stated herein, it is respectfully requested that the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit be granted and that the judgment of that Court be reversed. The taking of Petitioner's guilty plea failed to meet minimum Constitutional standards. If Petitioner really is guilty of major crimes (he is not), it should be proven in court. Petitioner, a 48 year old first-time offender, should not be incarcerated, effectively for life, because he misunderstood his rights, because his sentence was based on misinformation, because he was misled, and because he was deprived of effective assistance of counsel throughout all

of the proceedings.

Respectfully submitted,

Law Offices of
ANDRES ALONSO, JR.

By _____
Andres Alonso, Jr.
Attorneys for
Petitioner

APPENDIX A

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

HIPOLITO RIVERA-RAMIREZ,
Defendant-Appellant.

No. 82-1387
D.C. No. CR 81-908-1-TJH

Filed: September 6, 1983

OPINION

Appeal from the United States District Court for the Central District of California.

The Honorable Terry J. Hatter, Presiding

Argued and Submitted February 7, 1983

Before: HUG and CANBY, Circuit Judges, and RYAN,* District Judge.

HUG, Circuit Judge:

*/ The Honorable Harold L. Ryan, United States District Judge for the District of Idaho, sitting by designation.

Hipolito Rivera-Ramirez appeals an order denying his Fed. R. Crim. P. 32(d) motion to withdraw his guilty plea. Because none of the asserted errors constitutes manifest injustice, the denial of the motion was not an abuse of discretion. We therefore affirm.

Rivera-Ramirez was indicted on one count of possession of cocaine with intent to distribute and one court of conspiracy. 21 U.S.C. §§ 841(a) and 846. He pleaded not guilty to these charges, but subsequently entered into plea negotiations with the United States Attorney prosecuting the case. Through his attorney, Rivera-Ramirez agreed to accept the plea agreement offered by the Government.

At a hearing on November 16, 1981, Rivera-Ramirez withdrew his plea of not guilty and announced his intention to plead guilty to both counts of the indict-

ment. He was represented by counsel and also aided by an official court interpreter. The district judge read to Rivera-Ramirez the charges pending against him. The judge then questioned him as to his understanding of his trial rights and his satisfaction with his attorney's representation. Rivera-Ramirez responded that he understood each of his constitutional rights and that his plea was not the product of coercion, promises, or threats, but would be given freely and voluntarily. He acknowledged that the plea agreement he had entered into was based only on the Government's promise not to indict him on an additional charge, and that no representations had been made as to the sentence he would receive. He stated his understanding that the court "can give me a fifteen-year sentence for each charge and $25,000 fine for each,"

and was further advised of the possibility of a maximum lifetime special parole term and of an impact on his immigration status. The judge then explored the factual basis for the plea, accepting comments from Rivera-Ramirez, his attorney, and the prosecutor. Having found that the plea was knowing and voluntary and that a factual basis existed, the court accepted Rivera-Ramirez's plea of guilty to both counts. At a subsequent hearing, he was sentenced to the maximum penalty--two consecutive fifteen-year terms, a fine of $50,000, and a lifetime special parole term.

Several months later Rivera-Ramirez obtained new counsel. On May 17, 1982, he filed a motion under Fed. R. Crim. P. 32(d) for leave to withdraw his guilty plea. He contended his plea hearing had been conducted in violation of

Fed. R. Crim. P. 11 and various constitutional provisions. Following a hearing, the District Court denied the motion, and Rivera-Ramirez appeals the refusal to permit withdrawal of the plea.

Rivera-Ramirez's primary contention on appeal is that the District Court failed to comply with the requirement of Rule 11(c)(1) that the court "address the defendant personally in open court and inform him of, and determine that he understands, . . . the nature of the charge to which the plea is offered . . . ." Specifically, Rivera-Ramirez argues that, following the reading of the indictment, the court was obligated to explain further the terms "conspiracy" and "possession" and to inquire as to Rivera-Ramirez's understanding of these terms. He contends that the court's failure to satisfy the formal require-

ments of Rule 11 invalidated his guilty plea.

These claims require us to determine what burden a defendant bears in asserting a claim under Rule 32(d). Rule 32(d) provides:

> A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

In McCarthy v. United States, 394 U.S. 459, 472 (1969), the Supreme Court, in reviewing a judgment on direct appeal, held that a defendant whose plea was accepted in technical violation of Rule 11 was entitled to have the plea set aside and to plead anew. Until recently there was considerable question as to whether a technical violation of Rule 11 entitled the defendant to have

the plea set aside in a collateral proceeding under 28 U.S.C § 2255 or under Fed. R. Crim. P. 32(d).

The Supreme Court in United States v. Timmreck, 441 U.S. 780, 784-85 (1979), held that a technical violation of Rule 11 would not support a collateral attack under Section 2255 on a conviction based on a guilty plea, where there was no showing of constitutional error or special prejudice. After Timmreck, we held that collateral relief was not available when all that was shown was a failure to comply with the formal requirements of Rule 11. United States v. Lopez-Beltran, 619 F.2d 19, 20 (9th Cir. 1979).[1]

We emphasize that Rivera-Ramirez did not directly appeal the judgment of conviction in this case by filing a notice of appeal within the ten-day requirement of Fed. R. App. P. 4(b), as was the case

in McCarthy, nor did he file his Rule 32(d) motion within that ten-day period. Instead, he attacked the judgment several months later under Rule 32(d). Under those circumstances, his motion amounts to a collateral attack and he must meet the burdens imposed upon a defendant who seeks to set aside his plea in collateral proceedings. See United States v. Watson, 548 F.2d 1058, 1063 (D.C. Cir. 1977); United States v. Laura, 500 F.Supp. 1347, 1355 (E.D. Pa. 1980); see also Borman, The Hidden Right to Direct Appeal from a Federal Plea Conviction, 64 Cornell L. Rev. 319, 327 (1979).

Section 2255 and Rule 32(d) provide alternate routes to set aside a guilty plea collaterally. Under Section 2255 it is clear that claiming a technical violation of Rule 11 is insufficient. Instead, the defendant's burden is to

establish a constitutional or jurisdictional error, or that the proceeding in which his plea was accepted was "inconsistent with the rudimentary demands of fair procedure" or resulted in a "complete miscarriage of justice." Timmreck, 441 U.S. at 783-84 (quoting Hill v. United States, 368 U.S. 424, 428 (1962).) It must also be claimed that the procedural error prejudiced the defendant in that he was actually unaware of the consequences of his plea decision and, if properly advised, would not have pleaded guilty. Id.; see United States v. Crook, 607 F.2d 670, 672 (5th Cir. 1979); United States v. Horsley, 599 F.2d 1265, 1269 (3d Cir.) (en banc), cert. denied, 444 U.S. 865 (1979); Alessi v. United States, 593 F.2d 476, 478 (2d Cir. 1979), cert. denied, 451 U.S. 937 (1981).

A Rule 32(d) motion filed after

the time for appeal has expired is also collateral in nature, and the strict standard of McCarthy does not apply. Instead, the provisions of Rule 32(d) require that "manifest injustice" be found.

It has been suggested that Rule 32(d) and Section 2255 standards lead to indentical results. See C. Wright, 3 Federal Practice and Procedure, Section 539 at 211 & n.11 (2d ed. 1982); cf. Watson, 548 F.2d at 1063. The Section 2255 standard is supported by concern for judicial economy and the finality of judgments. Timmreck, 441 U.S. at 784. We have held that a Rule 32(d) motion invokes similar considerations:

> "[I]f a plea of guilty could be retracted with ease after sentence, the accused might be encouraged to plead guilty to test the weight of potential punishment, and withdraw the plea if the sentence were un-

> expectedly severe. The result would be to undermine respect for the courts and fritter away the time and painstaking effort devoted to the sentencing process."

Kadwell v. United States, 315 F.2d 667, 670 (9th Cir. 1963)(emphasis and footnote omitted).

We need not, however, determine in this case whether the Section 2255 standard applied in Timmreck is identical for all purposes to the manifest injustice standard of Rule 32(d).[2] It is sufficient to hold in this case that violation of the formal requirements of Rule 11 alone does not constitute manifest injustice. It is our view that United States v. Cantor, 469 F.2d 435, 437 (3d Cir. 1972), cited by appellant, which holds to the contrary, has been undermined by Timmreck.[3] We thus review the procedure followed under Rule 11 to determine not whether there

was a technical violation, but whether manifest injustice resulted.

Rivera-Ramirez claims that he was not adequately advised of the charges against him. Although Rule 11(c) requires the District Court to inform the defendant of the nature of the charges against him, no specific method of advising the defendant is mandated. See Fed. R. Crim. P. 11 Advisory Committee Note on 1974 Amendment; Mack v. United States, 635 F.2d 20, 25 (1st Cir. 1980). The information provided the defendant is sufficient if it provides him "an understanding of the law in relation to the facts" and thus permits a voluntary plea. McCarthy, 394 U.S. at 466. In this case, the District Court read the two counts of the indictment to Rivera-Ramirez, and then asked whether those were the charges to which he wished to plead guilty. The indictment read by the judge

was unique in that it was unusually factually detailed. Although we do not suggest that reading the indictment will in most instances satisfy the requirements of Rule 11, we conclude that the procedure adopted here did not result in manifest injustice. The detailed indictment allowed Rivera-Ramirez, aided by his attorney and an interpreter, to understand the charges against him. Moreover, Rivera-Ramirez has made no showing that he was prejudiced by the court's failure to further explain the charges. He did not claim, at the hearing on his motion to withdraw the plea or in his affidavit submitted to the District Court, that he did not understand the charges or that, better advised, he would not have pleaded guilty.[4/] The record of the plea hearing does not support the inference that Rivera-Ramirez did not comprehend what transpired.

For these reasons, the District Court correctly determined that the failure to explain the charges did not cause Rivera-Ramirez to suffer manifest injustice, and the refusal to permit withdrawal of the plea on this basis was not an abuse of discretion.

Rivera-Ramirez also argues that there was not a sufficient factual basis for the plea. Rule 11(f) requires the court to explore the factual basis in order to determine the accuracy of the plea. United States v. Barker, 681 F.2d 589, 592 (9th Cir. 1982). The rule prescribes no specific method of establishing the factual basis. See Fed. R. Crim. P. 11 Advisory Committee Note on 1974 Amendments. However, it must be established on the record the there is sufficient evidence to support the conclusion that the defendant is guilty. Santobello v.

New York, 404 U.S. 257, 261 (1971); United States v. Neel, 547 F.2d 95, 96 (9th Cir. 1976).

The District Court first elicited a statement from Rivera-Ramirez, who admitted to working as a mechanic on vehicles that he knew were used in drug transactions. When the prosecutor was asked to supplement this statement, he noted Rivera-Ramirez had been "unduly modest," and had, in fact, held a prominent role in a very large-scale drug distribution conspiracy. In support of this contention, the prosecutor specified that the conspiracy was based in four apartments in a complex in Van Nuys, California, and that Rivera-Ramirez had rented at least two of the apartments. In an authorized search of these apartments, agents of the Drug Enforcement Agency recovered 113.5 pounds of cocaine and approximately $2,000,000 in currency.

They also seized a money-counting machine, weapons, and ledgers in which the details of the operation were recorded. The ledgers revealed distribution of over 3,600 pounds of cocaine, which yielded $73,000,000. The ledgers also identified the head of the conspiracy as "HTO." Because Rivera-Ramirez's true name is Humberto, because he was arrested in the apartment designated as headquarters of the operation, and because he had obtained vehicles and apartments for the conspirators' use, the prosecutor inferred that Rivera-Ramirez was HTO. The ledgers indicated HTO's personal involvement in the conspiracy on numerous occasions, including trips to Miami to obtain cocaine and distribution to local dealers in Van Nuys.

Neither Rivera-Ramirez nor his attorney commented directly on this

evidence, but in response to the court's questions, Rivera-Ramirez admitted he had transported a substance he knew to be cocaine. He also admitted he knew the apartment in which he was arrested contained cocaine, and that he knew of no reason why his plea to the charges of conspiracy and possession with intent to distribute should not be accepted.

Within the context of this hearing, we consider this factual development to be minimally adequate. A more direct response from the defendant to the prosecutor's statements, and more detailed questioning of the defendant, definitely would have been preferable.[5/] However, because nothing on the record places the accuracy of the plea in doubt, the failure to develop a fuller record did not result in manifest injustice.

We address only briefly

Rivera-Ramirez's remaining contentions, which are without merit.[6] He argues Rule 11(c)(1) was violated in that he was not advised of the minimum possible special parole term he might be required to serve. Because he was advised that Count Two required a special parole term, that it might be a life term, and that it would convert to a life term in prison if the parole terms were violated, no possible prejudice could have resulted from this technical error.[7]

Rivera-Ramirez contends his attorney misinformed and misled him in negotiating and tendering his plea and, in general, provided ineffective assistance. He stated at the plea hearing, however, that he was satisfied with the representation he had received. He also avowed his understanding of each of the rights he now contends were erroneously

defined by his attorney. These solemn declarations made in open court carry a strong presumption of verity. Blackledge v. Allison, 431 U.S. 63, 74 (1977); United States v. Moore, 599 F.2d 310, 314 (9th Cir. 1979), cert. denied, 444 U.S. 1024 (1980). The District Court rejected Rivera-Ramirez's after-the-fact statements to the contrary. Because the assertions that the attorney had misled him are without support in the record, the court's credibility judgments were proper. See United States v. Degand, 614 F.2d 176, 178 (8th Cir. 1980); United States v. Becklean, 598 F.2d 1122, 1125-26 (8th Cir.) cert. denied, 444 U.S. 864 (1979).

Rivera-Ramirez asserts the prosecutor did not reveal the full terms of the plea agreement to the court. He and his counsel expressly stated at the plea hearing that the agreement had been

fully disclosed. His later statements to the contrary are without support.

The order denying leave to withdraw the guilty plea is AFFIRMED.

FOOTNOTES

1/ Page 4 (A-7) That case involved a motion to dismiss an indictment under 8 U.S.C. § 1325 for illegal entry, in which the alien contended that a prior conviction was invalid because of a failure to comply with Rule 11 in accepting the guilty plea.

2/ Page 6 (A-11) The question of the degree of the overlap between Section 2255 and Rule 32(d) was also left open by this court in United States v. Harris, 534 F.2d 141 n.1 (9th Cir. 1976). Our holding does not foreclose the possibility that some circumstances, not present in the instant case, might constitute "manifest injustice" without amounting to a violation of due process or another fundamental right. See J. Moore, 8A Moore's Federal Practice ¶ 32.07[4] (2d ed. 1978); Borman, The Hidden Right to Direct Appeal From a Federal Plea Conviction, 64 Cornell L. Rev. 319, 333 & n.81 (1979).

3/ Page 7 (A-11) Timmreck also reserved the question whether a technical violation could be a basis for collateral relief if it "occurred in the context of other aggravating circumstances." 441 U.S. at 784-85.

4/ Page 8 (A-13) Rivera-Ramirez's attorney argued before the District Court that a person in Rivera-Ramirez's situation would have difficulty understanding the charges against him. Argument is not evidence of the defendant's subjective understanding, and thus does not establish prejudice.

5/ Page 10 (A-17) The limitations on the factual development of this record resulted in part from tactical decisions by Rivera-Ramirez and his attorney. When Rivera-Ramirez was asked if he disagreed with any of the prosecutor's supplemental statement, his attorney interjected that Rivera-Ramirez wished to admit his guilt "in a manner that would least inculpate himself and other people." The attorney urged the court to accept the plea on the basis of the limited factual development and to rely instead on the presentence report.

6/ Page 10 (A-18) Rivera-Ramirez also asserts a challenge to his sentence and a claim that denying his new attorney access to the presentence report violated due process. Neither of these contentions is properly before this court on review of a Rule 32(d) motion.

7/ Page 10 (A-18) The prosecutor did state at the hearing that the court would be obligated to impose a minimum three-year special parole term on Count Two.

APPENDIX B

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Criminal Minutes - General

Case No. CR 81-908-TJH

Date June 14, 1982

Docket Entry: Entered on Courtran
June 16, 1982

PRESENT: Hon. Terry J. Hatter, Jr.,
Judge
Florence Kato, Deputy Clerk
Patricia Ferrier,
Court Reporter
James Walsh, Assistant
U.S. Attorney

U.S.A. v. Hipolito Rivera-Ramirez,
not present

Attorneys for Defendants, Andres Alonso,
Jr. and William Sheffield, both
present

PROCEEDINGS:

HRG re Dft's Motion to Withdraw Guilty
Plea.

Oral arguments heard. Motion denied.

APPENDIX C

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

HIPOLITO RIVERA-RAMIREZ,
Defendant-Appellant.

C.A. No. 82-1387

Filed: January 4, 1984

ORDER

Before: HUG AND CANBY,
Circuit Judges,
and Ryan,*
District Court Judge

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc rehearing,

*/ The Honorable Harold A. Ryan, United States District Judge for the District of Idaho, sitting by designation.

and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

Office - Supreme Court, U.S.
FILED
MAY 10 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1457

In the Supreme Court of the United States

OCTOBER TERM, 1983

HIPOLITO RIVERA-RAMIREZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
STEPHEN S. TROTT
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QUESTION PRESENTED

Whether petitioner is entitled to collateral relief from a conviction based on a guilty plea because of various alleged errors in the plea-taking proceeding, when petitioner admitted at that proceeding that he committed acts constituting the offenses in question.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	10
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Davis v. *United States*, 470 F.2d 1128	12
McCarthy v. *United States*, 394 U.S. 459	10, 11
Sassoon v. *United States*, 561 F.2d 1154	12
United States v. *Timmreck*, 441 U.S. 780	10, 11
United States v. *Untiedt*, 479 F.2d 1265	12

Statutes and rules:

21 U.S.C. 841(a)	2
21 U.S.C. 846	2
Fed. R. Crim. P.:	
Rule 11	8, 9, 10
Rule 32(d)	8, 11

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1457

HIPOLITO RIVERA-RAMIREZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A23) is reported at 715 F.2d 453.

JURISDICTION

The judgment of the court of appeals was entered on September 6, 1983. A petition for rehearing was denied on January 4, 1984 (Pet. App. C1-C2). The petition for a writ of certiorari was filed on March 2, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty in the United States District Court for the Central District of California to one count of possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a), and one count of conspiring to commit that offense, in violation of 21 U.S.C. 846. He was sentenced to consecutive terms of 15 years' imprisonment, a lifetime special parole term, and fines totalling $50,000 (Pet. App. A4).

1. Proceedings at the plea-taking hearing were translated into Spanish, the language petitioner speaks (Tr. 4-5).[1] The district court read to petitioner a portion of the indictment, including the following passages (Tr. 8-11):

> The * * * objects of the conspiracy were accomplished in substance as follows:
>
> > The defendants arranged for a source of supply of cocaine to provide cocaine for distribution in the Los Angeles, California area and elsewhere.
> >
> > The defendants rented a series of apartments located in various of the buildings comprising the Oakwood Garden Apartments * * *.
> >
> > The defendants purchased various items of paraphernalia for packaging cocaine for distribution to distributors and customers, including plastic baggies, scales, tape, mixing implements, wrapping paper and rubber gloves.
> >
> > The defendants also purchased and obtained equipment for collecting, counting, recording, packaging and storing the large

[1] "Tr." refers to the transcript of the hearing on November 16, 1981, unless otherwise indicated. We have lodged a copy of this transcript with the Court.

> quantities of United States paper currency which was accumulated as a result of the sales of cocaine, including an electric money counting machine * * *.
>
> The defendants also purchased and obtained numerous automobiles to be used to convey large quantities of cocaine and money from place to place. * * *
>
> * * * * *
>
> The defendants * * * organized a network of distributors who sold cocaine and collected the money from the sales and brought it to the Oakwood Garden Apartment complex for counting, packing and reshipment to other destinations.

The district court then discussed the various constitutional rights petitioner would have if he proceeded to trial, asking petitioner in each case whether he understood that he had those rights (Tr. 13-15) and whether he was prepared to relinquish them (Tr. 15-17). The court concluded this phase of the proceeding with the following colloquy (Tr. 16-17):

> THE COURT: Mr. Rivera-Ramirez, do you understand that you don't have to enter a plea of guilty here today, that you have a right to have the government prove its case against you in a court, and if they fail to prove their case against you beyond a reasonable doubt, then you have a right to demand that Counts One and Two and any other charge filed against you be dismissed?
>
> Do you understand that?
>
> DEFENDANT RIVERA-RAMIREZ: Yes, I understand that.
>
> THE COURT: Do you also understand that if you do enter your plea of guilty to Counts One and Two that you will be giving up the

various constitutional rights that we have just been talking about?

DEFENDANT RIVERA-RAMIREZ: Yes, I understand.

THE COURT: Do you understand that you will not have a trial?

DEFENDANT RIVERA-RAMIREZ: Yes, I understand.

THE COURT: Is this what you want to do, to give up your various constitutional rights?

DEFENDANT RIVERA-RAMIREZ: Yes.

THE COURT: Mr. Ramirez, are you pleading guilty freely and voluntarily?

DEFENDANT RIVERA-RAMIREZ: Yes.

THE COURT: Are you pleading guilty because you did indeed commit the acts which are charged in Counts One and Two of this indictment filed against you on October the 2nd, 1981?

DEFENDANT RIVERA-RAMIREZ: Yes.

THE COURT: Has anyone made any kind of a threat against you or anyone that you are related to, or anyone that you hold dear in order to get you to enter this plea?

DEFENDANT RIVERA-RAMIREZ: No.

The district court then repeatedly advised petitioner that it had not yet determined what his sentence would be (Tr. 18-19) and elicited from petitioner, in his own words, his understanding of the maximum sentence; petitioner's understanding was correct (Tr. 21). The court also advised petitioner that his conviction might have consequences for his immigration status (Tr. 23).

When petitioner confirmed that he wanted to plead guilty, the district court said to him (Tr. 25): "Now, Mr. Rivera-Ramirez, I want you to tell me in your own words * * * What did you do? What part did you play in this?" Petitioner replied that he had

helped maintain vehicles that were used as part of what he knew to be a cocaine merchandising operation (Tr. 25). After discussing his role in the offenses further with petitioner, the court asked government counsel if he wished to provide any further information to supplement the factual basis of the guilty plea. Government counsel stated that petitioner had been "unduly modest" and that "if [he] was not the head of the organization he was certainly a very knowledgeable member of it." Government counsel then said that the evidence developed by the government suggested that petitioner had rented two apartments and purchased at least one of the vehicles used in the cocaine conspiracy, and that records found in one of the apartments reflected that petitioner had, on one occasion, transported one million dollars from California to Florida on behalf of the conspiracy. Tr. 27-28. A search of one of the apartments rented by petitioner had uncovered 113.5 pounds of cocaine and $2 million in currency, together with weapons, ledgers, and a money-counting machine (Pet. App. A15-A16).

When government counsel had finished, the following exchange occurred (Tr. 28-31):

> THE COURT: * * * Mr. Rivera-Ramirez, you just heard the United States Attorney indicate certain alleged activity on your part.
>
> Do you disagree with any of the statements that he has just made?
>
> DEFENDANT RIVERA-RAMIREZ: (No response.)
>
> MR. CABALLERO [DEFENSE COUNSEL]: I would just like to address the Court at this moment, your Honor, if I might?
>
> THE COURT: You may do so before I inquire of your client, Mr. Caballero.

MR. CABALLERO: Yes. Thank you, your Honor. It was the intention of my client, it was my representation also to my client, that in order for him to plead guilty to these charges he had to admit guilt, first of all, he had to be guilty and he had to admit his guilt, and that he wanted to do it in a manner that would least inculpate himself and other people that he knew, other than the fact he would give the Court a sufficient factual basis to accept his plea of guilty.

We have attempted to do that in the short statement that he gave the Court. The Court is going to have the benefit of the probation report, and we would urge the Court to accept his plea of guilty on the basis of which he has indicated to the Court, that with knowledge of the narcotic transactions, his participation in transporting, that he himself said, in those automobiles, back and forth, narcotics and money to the location, and that, as such, he is guilty of Counts One and Two.

I would urge the Court to accept that as his plea, as that is the basis upon which I discussed how the plea would be taken of him, that so long as there was a sufficient factual basis that it would not be necessary for him to elaborate on it.

And we will have further information when we talk to the probation office.

THE COURT: All right. Let me inquire, does the government have any opposition to that request by Mr. Caballero?

MR. WALSH [GOVERNMENT COUNSEL]: I just want to make sure that there is a sufficient factual basis, your Honor. And I wasn't sure, perhaps I didn't hear all of what Mr. Rivera-Ramirez had to say, but if Mr. Rivera-Ramirez is admitting to your Honor that he on various

occasions transported cocaine and transported money—

THE COURT: I understood him to say that, yes.

MR. WALSH: I did not. And so perhaps I wasn't listening with sufficient attention.

THE COURT: Let me inquire of him directly with regard to that.

Now, Mr. Rivera-Ramirez, I am asking you whether or not you as a part of the conspiracy which is alleged in Count One of this indictment filed against you on October 2nd, 1981, transported cocaine for distribution on various occasions between January of 1981 and September the 24th, 1981, within the Central District of California.

DEFENDANT RIVERA-RAMIREZ: Yes, I transported it.

THE COURT: And you transported it knowing that it was cocaine; is that correct?

DEFENDANT RIVERA-RAMIREZ: I transported it knowing that it was cocaine.

THE COURT: And on September the 24th, 1981, the time that you were arrested, you knew that within that apartment there was cocaine, even though you did not know the amount or quantity of it; is that correct?

DEFENDANT RIVERA-RAMIREZ: Yes, I know.

The district court then accepted the guilty plea.

2. Petitioner was sentenced on January 29, 1982. At the sentencing proceeding, petitioner's trial counsel and government counsel debated whether petitioner was "HTO," a person who was revealed by ledgers seized from the apartments to be the leader of the conspiracy. Government counsel also emphasized the

size of the conspiracy—noting, for example, that it had $120 million in annual wholesale sales (1/19/82 Tr. 18)—and the harm done to society by cocaine. The prosecutor asked for the maximum sentence (1/19/82 Tr. 25-26). In his allocution, petitioner protested that the prosecuting attorney had erred in characterizing petitioner as the principal figure in the conspiracy (1/19/82 Tr. 29):

> I think the honorable U.S. Attorney could have made an error in his appreciation of my character.
>
> * * * The man responsible and the big man which those books talk about, they had him arrested and they put him—they let him go free the next day.
>
> I am not trying to accuse anybody. I simply want to expose to you, your Honor, that I am not the man that the U.S. Attorney says I am. I pled guilty with the sincere truth of my involvement in the acts of which I am accused.

The district court imposed the maximum sentence.

3. On May 17, 1982, approximately four months after his sentencing, petitioner, after obtaining new counsel, filed a motion under Rule 32(d) of the Federal Rules of Criminal Procedure for leave to withdraw his guilty plea. He primarily argued that the plea proceedings had been conducted in violation of Fed. R. Crim. P. 11. After a hearing, the district court denied his motion, and the court of appeals affirmed (Pet. App. A1-A23).

The court of appeals noted that because petitioner had neither appealed from his conviction nor moved to withdraw his guilty plea within the period allowed for filing a notice of appeal, "his motion amounts to a collateral attack and he must meet the burdens im-

posed upon a defendant who seeks to set aside his plea in collateral proceedings" (Pet. App. A8). Specifically, the court ruled, petitioner was required to show not just a "violation of the formal requirements of [Fed. R. Crim. P.] 11" but "manifest injustice" (Pet. App. A11).

The court of appeals ruled that petitioner had failed to satisfy this standard. It rejected petitioner's claim that he was not adequately advised of the nature of the charges against him, reasoning as follows (Pet. App. A12-A13; footnote omitted):

> In this case, the District Court read the two counts of the indictment to Rivera-Ramirez, and then asked whether those were the charges to which he wished to plead guilty. The indictment read by the judge was unique in that it was unusually factually detailed. Although we do not suggest that reading the indictment will in most instances satisfy the requirements of [Fed. R. Crim. P.] 11, we conclude that the procedure adopted here did not result in manifest injustice. The detailed indictment allowed Rivera-Ramirez, aided by his attorney and an interpreter, to understand the charges against him. Moreover, Rivera-Ramirez has made no showing that he was prejudiced by the court's failure to further explain the charges. He did not claim, at the hearing on his motion to withdraw the plea or in his affidavit submitted to the District Court, that he did not understand the charges or that, better advised, he would not have pleaded guilty. The record of the plea hearing does not support the inference that Rivera-Ramirez did not comprehend what transpired.

The court of appeals also ruled that there was sufficient factual basis for the guilty plea set forth in the

record, although it cautioned that the factual development was "minimally adequate" (Pet. App. A17). The court explained that "[a] more direct response from the defendant to the prosecutor's statements, and more detailed questioning of the defendant, definitely would have been preferable" (*ibid.*; footnote omitted). But because "nothing in the record place[d] the accuracy of the plea in doubt" (*ibid.*), and "[t]he limitations on the factual development of this record resulted in part from tactical decisions by [petitioner] and his attorney" (*id.* at A22 n.5), the court of appeals denied relief.

ARGUMENT

The court of appeals' decision is correct, and we rely on its opinion. While petitioner attempts to portray himself as the victim of an injustice, it is clear that his real objection is not to the guilty plea proceeding but to the severity of his sentence (see, *e.g.*, Pet. 32-34). But petitioner does not deny that the sentence was within the range authorized by law, and the record clearly shows that petitioner entered his guilty plea voluntarily and intelligently with a full understanding of the consequences that might follow. He is, therefore, not entitled to relief.

1. Petitioner appears to agree with the court of appeals that because this proceeding is a collateral attack on his conviction, he must show more than a technical violation of Fed. R. Crim. P. 11. See Pet. 22.[2] But although petitioner urges that there were

[2] Petitioner is plainly incorrect in suggesting (Pet. 21-22) that the court of appeals interpreted *United States* v. *Timmreck*, 441 U.S. 780 (1979), to overrule *McCarthy* v. *United States*, 394 U.S. 459 (1969). The court of appeals merely recognized—as petitioner apparently does (see Pet. 22)—that

numerous flaws in the plea-taking proceeding, he does not explain how he was prejudiced by them.

For example, petitioner asserts (Pet. 10, 24-25) that the district court did not adequately explain to him the nature or the elements of the offenses to which he was pleading guilty. In fact, the district court conducted the plea-taking proceeding in a way that was far more informative than merely advising petitioner of the abstract elements of the offenses would have been; by reading to petitioner an indictment that was readily understandable to a lay person, and by questioning petitioner further, the district court specified for petitioner the nature of the particular criminal scheme of which he was accused.

Moreover, petitioner admitted that he engaged in acts that constituted the crimes with which he was charged, and at the sentencing proceeding he again admitted his involvement in the cocaine distributing operation. There is no reason whatever to believe that any misunderstanding of the precise nature of the offenses—for example, of the distinction between distribution and possession with intent to distribute, a distinction that petitioner accuses the district court of having confused (see, *e.g.*, Pet. 10-11, 25)—could have prejudiced petitioner.

Similarly, although petitioner asserts (Pet. 25-28) that there was no adequate factual basis for his guilty plea, he does not approach making the kind of showing that would entitle him to relief. In particular, as the court of appeals noted, the evidence in the record at the time the sentence was imposed left

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McCarthy does not apply to collateral attacks. See *Timmreck*, 441 U.S. at 784. The "manifest injustice" standard applied by the court of appeals is derived from the language of Fed. R. Crim. P. 32(d), which was the basis of petitioner's motion.

no room for serious doubt about petitioner's guilt. Petitioner specifically admitted not only that he served as automobile mechanic for the conspiracy but that he knowingly transported cocaine in furtherance of the conspiracy and that he knew the apartment he occupied contained cocaine. Moreover, there is no requirement that the factual basis supporting a guilty plea be developed from the defendant's own words; it can be supplied by the government as well. See, *e.g.*, *Sassoon* v. *United States*, 561 F.2d 1154, 1159 (5th Cir. 1977); *United States* v. *Untiedt*, 479 F.2d 1265, 1266 (8th Cir. 1973); *Davis* v. *United States*, 470 F.2d 1128 (3d Cir. 1972). Here, government counsel gave a detailed description, supported by specific references to evidence, of a massive conspiracy in which petitioner played an important role.[8]

2. Petitioner also claims (Pet. 28-32) that he was sentenced on the basis of false information suggesting that petitioner was "HTO." We doubt that this claim can be raised as a reason for seeking to withdraw a guilty plea; even if it were correct, petitioner would presumably be entitled only to resentencing, not to an opportunity to enter a new plea.

But in any event, petitioner's claim is without foundation. The district court described in detail its reasons for imposing the maximum sentence on petitioner (1/19/28 Tr. 30-33). Those reasons concerned the magnitude of the operation, a point petitioner even now does not dispute; the fact that petitioner did play a significant role in the operation, a point he acknowledged at both the plea-taking and

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[8] The United States Attorney's Office advises us that petitioner is incorrect in his assertion (Pet. 18) that the government conceded before the court of appeals that there was no factual basis for the plea of guilty to the conspiracy count.

the sentencing proceedings; and the judge's views about the damage caused to society by trafficking in cocaine and the possible deterrent effect of a severe sentence. The court specifically stated that he was not relying on the conclusion that petitioner was the central figure of the conspiracy (1/19/82 Tr. 32):

> [W]hile you, indeed, may not be HTO, but just having admitted the guilt that you have with regard to this particular matter is sufficient for me * * *. I feel that this is the kind of case where the maximum sentence must, indeed, be given. The message must go out back further than Miami. It must go back to Colombia that when people come here and attempt to destroy our society with the mere aggrandizement of themselves they will be expected to receive the severest penalties possible and they will be meted out.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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